SUPREME COURT, U.S.
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No. _____

In The

Supreme Court of The United States

October Term, 1994

MARIE BLACK

Petitioner,

VERSUS

J. I. CASE

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

1. Whether, in light of contrary holdings of other circuits, the holding by the Court of Appeals for the Fifth Circuit that the district court's denial of summary judgment was not reviewable on appeal where there had been a subsequent trial on the merits and a jury verdict adverse to the movant is in error?

2. Is it proper to deny a motion for summary judgment where the party opposing the motion has not offered any factual evidence, by way of affidavit or otherwise, in opposition of the motion?

3. Is the rule applied by the Court of Appeals for the Fifth Circuit, refusing to hear appeals of denials of motions for summary judgment, to be applied prospectively or retroactively?

4. Is the grant of partial summary judgment in any way procedurally distinct from the denial of summary judgment so that the grant of partial summary judgment may be reviewed on appeal and denial of summary judgment may not?

LIST OF ALL PARTIES

Plaintiff-Appellant

Marie Black, Individually and as Representative of Randy Black, Pam Black Gum, Kitty Black, Adults, and William Black and Tammy Black, Minors the Sole and Only Heirs at Law of Romie Black

Defendant-Appellee

J. I. Case

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In The

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October Term, 1994

MARIE BLACK

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Marie Black, Petitioner, petitions for Writ of Certiorari to review the Fifth Circuit's decision of May 27, 1994 which Affirmed the Trial Court's Order Denying Plaintiffs' Motion for Partial Summary Judgment dated May 10, 1991.

OPINIONS BELOW

The Trial Court Order denying partial summary judgment dated May 10, 1991, issued in conjunction with a Memorandum Opinion, was not published. The Trial Court Order and Memorandum Opinion are included as Appendix B.

The May 27, 1994 Memorandum opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is reported at 22 F.2d 568 (5th Cir. 1994) and is attached as Appendix A.

JURISDICTION

The Court has jurisdiction, by Writ of Certiorari under 28 U.S.C. Section 1254, to review the decision of the United States Court of Appeals for the Fifth Circuit entered on May 27, 1994.

STATEMENT OF THE CASE

On September 8, 1986, Petitioner's decedent, Romie Black (hereinafter "Black"), borrowed a used 1979 Case Model 580-D backhoe from Respondent's retail store in Tupelo, Mississippi while Black waited for Respondent to make changes and modifications to a second backhoe, 1979 Case Model 580-C serial number 8983508, which Black was purchasing from Respondent. Five days later, Black was killed when the seat locking mechanism on the substitute backhoe, an integral part of the machine's rollover protection system (hereinafter "ROPS"), failed

causing the seat to rotate downward catapulting Black into the left rear ROPS steel post, killing him instantly. Black was the sole income provider for petitioner and their five children.

Petitioner brought suit in the Circuit Court of Lee County, Mississippi on March 26, 1990. Respondent removed the case to the United States District Court for the Northern District of Mississippi alleging jurisdiction based upon complete diversity of citizenship.

On January 4, 1991, Petitioner filed her Motion for Partial Summary Judgment as to Liability. In her Motion for Partial Summary Judgment, Petitioner alleged that Case: 1) breached its implied warranty of merchantability with respect to the loan of the substitute backhoe; 2) failed to warn Black of latent defects in the backhoe and to instruct Black in the operation of the backhoe; and 3) failed to inspect the backhoe prior to its loan to Black as required in the owner's manual.

On January 18, 1991, Respondent filed its Response to Plaintiff's Motion for Partial Summary Judgment, along with its Memorandum of Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment. In support of its Response, Respondent offered no evidentiary support in the form of affidavit or otherwise to contradict the undisputed facts that existed at the time Petitioner filed her Motion for Partial Summary Judgment.

The trial court subsequently denied Petitioner's Motion.

Following a full trial on the merits, Petitioner moved for a directed verdict which the district court denied. The jury returned its verdict for Respondent. The district court, then, denied Petitioner's motion for judgment notwithstanding the verdict (j.n.o.v.) or for a new trial.

Petitioner appealed the district court's denial of her motion for partial summary judgment to the United States Court of Appeals for the Fifth Circuit. Citing its own precedent and several supporting decisions of other circuits, but also noting other contrary opinions both within the Fifth Circuits and in other Circuits, the Fifth Circuit held that the pre-trial denial of a motion for summary judgment would not be reviewed where, on the basis of a subsequent full trial on the merits, final judgment is entered adverse to the movant. 22 F.2d 568 (5th Cir. 1994).

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT SINCE THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS AND AMONG THE DECISIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

The United States Court of Appeals for the Fifth Circuit, in determining that orders denying summary judgment would not be reviewed where there had been a full trial on the merits and a subsequent verdict adverse to the movant, announced, rather perfunctorily, that its decision was "in harmony with the overwhelming majority of the other circuits which have considered the issue." In

support of its statement, the court cited cases from the Sixth, Eighth, Ninth, Tenth and Federal Circuits as constituting its majority.

While there may be, arguably, considerable support for the decision of the Fifth Circuit among the other circuits, the very fact that the Fifth Circuit stated that it is in the majority of circuits necessarily implies that there is at least one, and perhaps more than one, circuit which has not taken the position assumed by the Fifth Circuit regarding the appealability of denials of summary judgments. Such a split of authority certainly compels the Court to grant *certiorari*. In *F.T.C. v. Flotill Prod., Inc.* 389 U.S. 179 (1967), this Court granted *certiorari* where the decision of the Court of Appeals from which appeal was made conflicted with decisions of other Courts of Appeals. Also, in *U.S. v. California Eastern Line*, 348 U.S. 351 (1955), *certiorari* was granted where courts of appeals for two circuits had interpreted differently their reviewability of Tax Court renegotiation orders.

Federal Rule of Civil Procedure 56 provides the framework by which litigants are to employ summary judgment and by which trial courts are to either grant or deny such motions. Appeals of grants or denials are not governed by the rules, but, rather, by 28 U.S.C. Sections 1291 and 1292(a) & (b). For any ruling of a district court to be reviewable, it must be a final order, with few notable exceptions. Obviously, there is no immediate right to appeal the denial of a motion for summary judgment because the court of appeals, in most instances, does not have jurisdiction to hear the appeal of an interlocutory order. *See Sacred Heart Med. Center v. Sullivan*, 958 F.2d

537 (3rd Cir. 1992); *Duran v. City of Douglas, Arizona*, 904 F.2d 1372 (9th Cir. 1990); *Gometz v. Culwell*, 850 F.2d 461 (8th Cir. 1988); *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661 (Fed. Cir. 1986).

However, the problem and, thus, the dispute among the circuits arises when a movant attempts to appeal the denial of his motion for summary judgment after final judgment has been entered following a jury verdict against him.

The Fifth Circuit's decision refusing to review denials of motions for summary judgment is in accord with the decisions of several circuits. *See Summit Petroleum v. Ingersoll-Rand,* 909 F.2d 862 (6th Cir. 1990); *Bottineau Farmers Elevator v. Woodward-Clyde Consultants,* 963 F.2d 1064 (8th Cir. 1992); *Lum v. City and County of Honolulu*, 963 F.2d 1167 (9th Cir. 1992), *certiorari denied* 113 S.Ct. 659 (1992); *Boyles Galvanizing & Plating Co v. Hartford Accid. & Indemn. Co.*, 372 F.2d 310 (10th Cir. 1967); *Claros v. H. H. Robertson Co.*, 797 F.2d 1564 (Fed. Cir. 1986).

However, in *Savarin Corp. v. National Bank of Pakistan,* 447 F.2d 727 (2d Cir. 1971), the Second Circuit reviewed the district court's denial of summary judgment where the movant lost at trial and then appealed the final judgment to the Court of Appeals. Although the Second Circuit did not overturn the district court's denial of summary judgment, as should be done in the instant case, its decision shows that, in the Second Circuit, denials of summary judgment will be reviewed after the movant has had a full trial.

Also, the Eleventh Circuit has stated that denials of motions for summary judgment could not be appealed where the moving party conceded that the facts at the time of trial were sufficient to place before a jury. *Holley v. Northrop Worldwide Aircraft Serv.*, 835 F.2d 1375 (11th Cir. 1988). Where the facts at trial were not sufficient to place before a jury, or where the movant did not concede such, the Eleventh Circuit would review the denial of a motion for summary judgment. Such would be the circumstances in the instant case.

In addition, the Seventh Circuit will review all antecedent interlocutory rulings on appeal from the district court's final judgment. *Reilly v. Waukesha Co., Wis.*, 993 F.2d 1284 (7th Cir. 1993); *Edwin Raphael Co. v. Maharan Fabrics Corp.*, 283 F.2d 310 (7th Cir. 1960).

Even the circuits relied upon in the Fifth Circuit's opinion below will review other interlocutory orders on appeal from final judgment. *Dickinson v. Auto Center Mfg. Co.*, 733 F.2d 1092 (5th Cir. 1983) (interlocutory denying directed verdict merges and may be reviewed on appeal); *Hellerstein v. Mr Steak, Inc.*, 531 F.2d 470 10th Cir. 1976), *certiorari denied* 429 U.S. 823 (1976); *Jarrett v. Epperly*, 896 F.2d 1013 (8th Cir. 1990) (other interlocutory orders merge into final judgment and may be appealed).

As recently as January 25, 1993, during the pendency of this, the Court of Appeals for the Fifth Circuit itself stated that a defendant's notice of appeal placed before the court each of the trial court's adverse rulings against defendant, *including its pretrial denial of defendant's motion for summary judgment*, even after an adverse

verdict against defendant. *Satcher v. Honda Motor Co., Ltd.*, 984 F.2d 135 (5th Cir. 1993) (Satcher I). Although this case was subsequently vacated on other grounds, the court never recanted the doctrine espoused in Satcher I. *Satcher v. Honda Motor Co, Ltd.*, 993 F.2d 56 (5th Cir. 1993) (Satcher II). *See also Albatross Shipping Corp. v. Stewart*, 326 F.2d 208 (5th Cir. 1964) (order is final for purposes of appeal only when order terminates litigation; order granting partial summary judgment was not final for purposes of appeal and correctness of ruling could be challenged if and when case was appealed from final judgment).

CONCLUSION

Surely, *certiorari* should be granted when such a conflict arises among the United States Circuit Courts of Appeal. The Fifth Circuit's determination that denials of motions for summary judgment are never appealable where there has been an adverse jury verdict against the movant conflicts with the Eleventh Circuit's decision in *Holley v. Northrop Worldwide Aircraft Serv.* and the Seventh Circuit's decision in *Reilly v. Waukesha County.* The Fifth Circuit's decision goes even further and creates a conflict with existing authority within the Fifth Circuit. *See Albatross Shipping* and *Satcher I, supra.* The split among the decisions of the Fifth Circuit leaves the distinct impression that a portion of the Fifth Circuit views the denial of a summary judgment reviewable on appeal even after an adverse jury verdict on the merits against the adverse. As such, there is a compelling basis for granting the writ in this case to resolve the significant conflict among the circuits and within the Fifth Circuit. Petitioner,

therefore, respectfully prays that this writ be granted and this conflict be settled.

Respectfully submitted,

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In The

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APPENDICES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7010

MARIE BLACK, Individually and as representative of RANDY A. BLACK, PAM BLACK GUM, KITTY BLACK, adults, and WILLIAM A. BLACK and TAMMY BLACK, minors, the sole and only heirs at law of ROMIE BLACK

Plaintiffs-Appellants

versus

J.I. CASE,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Mississippi

Before GARWOOD and HIGGINBOTHAM, Circuit Judges, SCHWARTZ* District Judge. GARWOOD, Circuit Judge:

* District Judge of the Eastern District of Louisiana, sitting by designation.

This is a Mississippi diversity case arising from the death of Romie Black (Decedent) who was killed in an accident involving a backhoe. His successors, plaintiffs-appellants herein (collectively, the Blacks), appeal the judgment on the jury verdict in favor of defendant-appellee J.I. Case Company, Inc. (Case). We affirm.

This appeal was previously considered by another panel of this Court which issued an opinion affirming the judgment below. This earlier opinion was subsequently withdrawn and vacated.[2] *Black v. J.I. Case Co.* 973 F.2d 1226, 1227-31 (5th Cir. 1992). It appears likely that the withdrawal was because of a perceived uncertainty concerning the propriety of reviewing an interlocutory order denying summary judgment on an appeal following trial on the merits and final judgment based thereon adverse to the summary judgment movant.[3] We now conclude that this Court will not review the pretrial denial of a motion for

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[2] The prior panel thereupon assigned the case to the calendar, and in due course it was reassigned to this panel.

[3] It seems that the perceived conflict was likely with *Satcher v. Honda Motor Co.*, 984 F.2d 135 (5th Cir. 1993). In *Satcher*, this Court reviewed and reversed the district court's denial of the defendant's summary judgment motion, after the defendant received an adverse judgment following trial on the merits. *Id.* at 137. However, the original *Satcher* opinion has also been vacated and withdrawn, and it has been replaced by *Satcher v. Honda Motor Co.*, 993 F.2d 56 (5th Cir. 1993). The new *Satcher* opinion does not address the issue of whether a denied summary judgment motion should be reviewed on appeal after a full trial on the merits.

summary judgment where on the basis of a subsequent full trial on the merits final judgment is entered adverse to the movant.[4]

FACTS AND PROCEEDINGS BELOW

On September 13, 1986, Decedent was killed while operating a backhoe loaned to him by Case when the machine rolled over and his head struck one of the posts which supported the backhoe's canopy. On March 26, 1990, the Blacks, as successors to Decedent's interest, brought this suit against Case. They subsequently filed a motion for partial summary judgment as to liability for breach of an implied warranty of merchantability, failure to warn of latent defects, failure to instruct the operator on the safe operation of the machine, and failure to inspect. Case opposed the motion for summary judgment, contending that it did not cause the accident, but rather that the Decedent's death was caused by his operation of the backhoe on too steep a slope while not wearing a seatbelt. Case, however, did not submit any summary

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[4] This decision in no way affects our holdings regarding a district court's interlocutory determinations that are subject to immediate review such as its ruling concerning a party's partial or total immunity from suit. *See e.g. Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993); *Mobile Corp. v. Abeille General Ins. Co.*, 984 F.2d 664 (5th Cir. 1993); *Williams v. Collins*, 728 F.2d 721 (5th Cir. 1984). Nor does it concern our decisions reviewing denied motions for summary judgment where the district court granted the opposing party's summary judgment motion. *See Ranger Ins. Co. v. Estate of Mijne*, 991 F.2d 240, 241 (5th Cir. 1991).

judgment evidence to support its position, but rather relied on the Blacks' summary judgment evidence which included answers to interrogatories indicating Case's anticipated expert testimony at trial and affidavits of Case's employees. The district court denied the Blacks' partial summary judgment motion noting that their own evidence created factual disputes as to each asserted theory, and that, in any event, the court had the power to deny summary judgment where it thought "the better course would be to proceed to trial."

The case was subsequently fully tried on the merits. At the close of all the evidence, the Blacks made a motion for a directed verdict which the district court denied. The jury thereafter found for Case. The Blacks then filed for judgment notwithstanding the verdict (j.n.o.v.) or for a new trial. The motions were also denied by the district court. The Blacks now bring this timely appeal, arguing that the district court erred in denying their motion for partial summary judgment, and that it also erred in several other respects. We affirm.

DISCUSSION

I. Motion for Summary Judgment

The Blacks first argue that the district court erred in denying their motion for partial summary judgment because Case failed to present any evidence to create a disputed fact issue. Based on earlier precedent of this Court and other circuits, the Rules of Civil Procedure, the discretion of district courts in this area, and other prudential concerns, we agree with the prior panel's conclusion that

this order should not be reviewed.

This court has already held that an interlocutory order denying summary judgment is not to be reviewed where final judgment adverse to the movant is rendered on the basis of a subsequent full trial on the merits. *See Wells v. Hico ISD,* 736 F.2d 243, 251 n.9 (5th Cir. 1984), *cert. dismissed,* 106 S.Ct. 11 (1985); *Zimzores v. Veterans Administration,* 778 F.2d 264, 267 (5th cir. 1985).[5] In *Wells*, the defendants-appellants suffered an adverse judgment entered on the jury's verdict following full trial on the merits, and prior to trial the district court had denied their motion for summary judgment on the question whether the plaintiffs-appellees had a property interest in their teaching positions. 736 F.2d at 251. We held that

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[5] Only one case, in dicta, has suggested by inference that an interlocutory order denying summary judgment is reviewable. *See Dickinson v. Auto Center Mfg. Co.*, 733 F.2d 1092 (5th Cir. 1983). There, this Court rightly held that it could review the district court's order overruling the appellant's motion for a directed verdict at the close of the evidence. *Id.* at 1102; *see Fed. R. Civ. P.* 50(d). However, in nonbinding dicta, the *Dickinson* court noted that "a party may obtain review of prejudicial adverse interlocutory rulings upon his appeal from adverse final judgment." *Id.* This over-broad dicta might imply that all interlocutory orders-including denials of motions for summary judgment-may be reviewed on appeal. However, the decision does not discuss any other interlocutory rulings. Such an unexplained generalization is nonbinding in the face of this Court's specific holdings to the contrary. *See e.g. Nicor Supply Ships Associates v. General Motors,* 876 F.2d 501,506 (5th Cir. 1989).

the district court's rulings denying the summary judgment motions could not be reviewed because, "Once trial began, the summary judgment motions effectively became moot." *Id.* at 251 n.9. Similarly, in *Zimzores*, we declined to review the denial of the plaintiff-appellant's motion for summary judgment which contended that there existed no factual dispute as to liability. We noted that "it is particularly difficult to understand how the ends either of justice or of orderly procedure would be furthered were we to hold that the plaintiff is entitled to summary judgment when the facts adduced at the full trial on the merits adequately support the findings and judgment for the defendants." 778 F.2d at 267. By reaffirming our rule announced in these cases that orders denying summary judgment motions will not be reviewed in such circumstances, we remain in harmony with the overwhelming majority of other circuits which have considered the issue. *See Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1068-69 n.5 (8th Cir. 1992); *Lum v. City of Honolulu*, 963 F.2d 1167, 1170 & n.1 (9th Cir.), *cert. denied* 113 S.Ct 659 (1992); *Summit Petroleum v. Ingersoll-Rand*, 909 F.2d 862, 865 n.4 (6th Cir. 1990); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1359 (9th Cir. 1987); *Claros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 & n.14 (Fed. Cir. 1986), *cert. dismissed*, 107 S.Ct. 1262 (1987); *Boyles Galvanizing & Plating Co. v. Hartford Accident & Indemnity Co.*, 372 F.2d 310, 312 (10th Cir. 1967).[6]

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[6] One circuit has decided a case that could be read as supporting a dual system for evaluating denied motions for

summary judgment in such circumstances. *See Holley v. Northrop Worldwide Aircraft Services, Inc.*, 835 F.2d 1375, 178 & n.7 (11th Cir. 1988). Under this dichotomy, if the motion were denied on "factual" grounds (e.g., no evidence as to an element required under governing law), then the order should not be reviewable. However, if the motion were denied on "legal" grounds (e.g., the elements that must be proven under governing law), then that determination should be reviewable. The first problem with fashioning this dichotomy is that the Wells court refused to review a summary judgment motion that was at least arguably based on "legal" grounds-whether the plaintiffs had a property interest in their teaching positions. 736 F.2d at 251 n.9. Second, even if this issue had not already been foreclosed in this Circuit, another difficulty with such a system is distinguishing between "factual" and "legal" issues. All summary judgments are rulings of law in the sense that they may not rest on the resolution of disputed facts. We recognize this by our de novo standard of reviewing summary judgments. *See e.g. Green v. Touro Infirmary*, 992 F.2d 537, 538-39 (5th Cir. 1993); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th cir. 1993); *Davis v. Illinois Cent. R.R.*, 921 F.2d 616, 617-18 (5th Cir. 1991). Moreover, our ability to distinguish such "factual" and "legal" issues will be hampered in instances (which are by no means rare) where the district court gives no, or only very generalized, reasons for denying the motion. In any event, such a dual approach would require us to craft a new jurisprudence based on a series of dubious distinctions between law and fact. And, such an effort-added to the tasks of already overburdened courts of appeal-would benefit only those summary judgment movant who failed to properly move for judgment as a matter of law at the trial on the merits. *Fed. R. Civ. P.* 50. If such motions are properly made, the denied motions for summary judgment need not be reviewed, because

Furthermore, the rule reaffirmed today is in keeping with Federal Rules of Civil Procedure 50(a) and (b), and our related jurisprudence. We have long recognized that where a party has a judgment rendered against him based on an adverse jury verdict, judgment may not be rendered for him on appeal (and j.n.o.v. in his favor may not be granted) unless that party has moved for a directed verdict in the district court. *See e.g. Hinojosa v. City of Terrell,* 834 F.2d 1223, 1228 (5th Cir. 1988), *cert. denied,* 110 S.Ct. 80 (1989); *McConney v. City of Houston,* 863 F.2d 1180, 1186-88 (5th Cir. 1989); *see also Johnson v. New York, N.H. & H.R. Co.,* 73 S.Ct. 125, 128 (1952). However, reviewing on appeal a pretrial denial of a motion for summary judgment would circumvent this rule by allowing us to reverse and render even when no motion for directed verdict and motion for j.n.o.v. had been made at trial. If such motions have been made, their denial can be reviewed on appeal and there is no good reason to also review the pretrial denial of the same party's motion for summary judgment.

To review pretrial denials of summary judgment motions would also diminish the discretion of the district court, in contravention of our jurisprudence and that of the

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the "legal" issues determined by the district court are freely reviewable, and the case may be reversed and rendered on that basis. *See e.g. Knowlton v. Greenwood ISD,* 957 F.2d 1172, 1177-78 (5th Cir. 1992); *Cotton Bros. Baking Co. v. Indus. Risk Insurers,* 941 F.2d 380, 390-91 (5th Cir. 1991), *cert. denied,* 112 S.Ct. 2276 (1992); *Nesmith v. Alford,* 318 F.2d 110, 118 (5th Cir. 1963), *cert. denied,* 84 S.Ct. 489 (1964).

Supreme Court. The Supreme Court has recognized that, even the absence of a factual dispute, a district court has the power to "deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2513 (1986). We, too, have recognized that (except in cases of qualified or absolute immunity) a district court "has the discretion to deny a [motion for summary judgment] even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial." *Veillon v. Exploration Services*, 876 F.2d 1197, 1200 (5th Cir. 1989); *see also Marcus v. St. Paul Fire & Marine Ins.*, 651 F.2d 379, 382 (5th Cir. 1981). If we were to review denied motions for summary judgment, the district court would no longer have this discretion.

Finally, prudential concerns argue against reviewing such motions. To review the pretrial denial of a motion for summary judgment, we would have to review two different sets of evidence: the "evidence" before the district court at pretrial when it denied the motion, and the evidence presented at trial. Of course, the "evidence" presented at pretrial may well be different from the evidence presented at trial. it makes no sense whatever to reverse a judgment on the verdict where the trial evidence was sufficient merely because at summary judgment it was not.[7] As we

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[7] This seems to be the Black's motivation in asking us to review their denied summary judgment motion. They made a motion for directed verdict and j.n.o.v., so any points of error concerning the district court's decisions regarding the

noted in *Woods v. Robb*, 171 F.2d 539 (5th Cir. 1948): "The saving of time and expense is the purpose to be attained by a summary judgment in a proper case. When in due course the final trial is had on the merits it becomes the best test of the rights of the movant. If he wins on trial he has his judgment. If he loses on a fair trial it shows that he ought not to have any judgment." *Id.* at 541. For all of these reasons, we are firmly convinced that the better course is to decline to review the district court's denial of motions for summary judgment when the case comes to us on the movant's appeal following adverse judgment after full trial on the merits.

II. Remaining Issues

The Blacks argue that the district court also erred by: (1) refusing to grant their motion for directed verdict; (2) allowing Case to amend the pretrial order to allege that the accident was caused by the sole negligence of Decedent; (3) refusing to allow testimony regarding the position of the backhoe's boom at the time of the accident; (4) instructing

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applicable law or insufficient trial evidence are freely reviewable. *See Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969). It makes no difference whether we review the district court's "legal" decisions under the rubric of the denied summary judgment or the directed verdict motion. *See Hamilton v. Grocers Supply Co.*, 986 F.2d 97, 98 (5th Cir. 1993) (noting that "[t]he standard of review for a directed verdict is the same as that for review of a summary judgment:). Rather, the Blacks obviously hope that we will reverse based on the embryonic facts that existed before trial, as opposed to the fleshed-out facts developed at trial.

the jury regarding Decedent's misuse of the backhoe; and (5) refusing the allow the jury to consider awarding punitive damages. Having reviewed the record and briefs, we conclude that the prior panel opinion correctly disposed of and adequately addresses all these issues, none of which are of a precedential nature or otherwise appropriate for publication.

We would merely add that as to the first issue, the Blacks, in support of their contention that the district court should have granted their motion for directed verdict because of insufficient evidence, point to the recent Mississippi Supreme Court decision in *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993). The *Sperry* court adopted a "risk-utility" analysis for products liability cases. *Id.* at 256. The district court, here, in accordance with our precedent, used a "consumer-expectations" analysis in trying the Blacks' products liability theory. Consistent with this analysis, Case relied, in part, on the "open and obvious" defense. The Blacks argue that this defense does not exist under the "risk-utility" analysis. As noted by the *Sperry* court, such a defense is now "simply a factor to consider in determining whether a product is unreasonably dangerous." *Id.* at 265 n. 4. However, what has not changed is the Blacks' burden to prove under a products liability theory that the defective condition caused the physical harm to the ultimate user of the product. *Id.* at 253. Here, the evidence was not such as to require the jury to find that the defective condition was a cause of

Decedent's injuries.[8] Therefore, the change in analysis does not establish that the district court erred in denying the Blacks' motion for directed verdict.

As to the second issue concerning the district court's allowing Case to amend the pretrial order on the first day of trial, the Blacks claim that they were unfairly surprised because the amendment added a new defense.[9] However, the district court offered the Blacks a continuance which they declined. Where a party claims unfair surprise "the granting of a continuance is a more appropriate remedy than exclusion of the evidence." *Fed. R. Evid.* 403 advisory committee's note. If the Blacks were prejudiced

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[8] The Blacks, in a separate point of error, argue that Case should be foreclosed from arguing that Decedent was the sole proximate cause of his death. We disagree for the reasons stated in the prior opinion.

[9] This alleged new defense is that Case would seek to show that Decedent was the sole proximate cause of his death instead of a proximate cause. This did not affect the Blacks' calculus of the types of evidence they would have to refute, and it did not interject a new issue into the proceeding. We also note that this Court has stated that it has "limited reversible error from unfair surprise to situations where a completely new issue is suddenly raised or a previously unidentified expert witness is suddenly called to testify." *F & S Offshore*, 662 F.2d at 1108 (citing *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir. 1978)). Neither of these conditions obtain here. We need not determine whether in special circumstances we might go beyond the categories mentioned in *F & S Offshore*, for here there is certainly no strong showing of unfairness or prejudice.

by unfair surprise, the district court's offer of a continuance rectified any error that might have occurred. *See F & S Offshore, Inc. v. K.O. Steel Castings, Inc.* 662 F.2d 1104, 1108 (5th Cir. 1981) (holding that the district court did not abuse its discretion in admitting new evidence where the complaining party "failed to urge a motion for continuance in response to what they now contend is unfair surprise").

CONCLUSION

Accordingly, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7010

D.C. Docket No. EC90-85-D-D

MARIE BLACK, Individually and as representative of RaNDY A. BLACK, PAM BLACK GUM, KITTY BLACK, adults, and WILLIAM A. BLACK and TAMMY BLACK, minors, the sole and only heirs at law of ROMIE BLACK,

Plaintiffs-Appellants

J.I. CASE COMPANY, INC.

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Mississippi

Before GARWOOD and HIGGINBOTHAM, Circuit Judges, SCHWARTZ,* District Judge.

J U D G M E N T

* District Judge of the Eastern District of Louisiana, sitting by designation.

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, IT is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

May 27, 1994

ISSUED AS MANDATE: June 20, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARIE BLACK, INDIVIDUALLY AND AS
REPRESENTATIVE OF RANDY BLACK, ET AL

Plaintiffs,

vs. CIVIL ACTION NO. EC 90-85-D-D

J.I. CASE

Defendant

ORDER DENYING PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

In accordance with a memorandum opinion entered this day, plaintiffs' motion for partial summary judgment is denied.

ORDERED, this 10th day of May, 1991.

/S/ GLEN H. DAVIDSON
GLEN H. DAVIDSON
United States District Judge

FILED
May 10, 1991
JAMIE WALKER, Clerk
By Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARIE BLACK, INDIVIDUALLY AND AS
REPRESENTATIVE OF RANDY BLACK, ET AL

Plaintiffs,

vs. CIVIL ACTION NO. EC 90-85-D-D

J.I. CASE

Defendant

MEMORANDUM OPINION

This matter comes before the court on plaintiffs' motion for partial summary judgment. The case involves a complaint for wrongful death which allegedly occurred on September 13, 1986 when plaintiffs' decedent, Romie Black, was operating a backhoe loaned to him by the defendant. Originally filed in the Circuit Court of Lee County, Mississippi, the action was removed to this court on the basis of diversity jurisdiction. Plaintiffs allege that the defendant is liable under three theories: 1) breach of warranty of merchantability; 2) negligent failure to instruct and warn; and 3) negligent failure to inspect the backhoe.

Claiming the absence of genuine issues of material fact, plaintiffs have moved for partial summary judgment on the issue of liability only. However, the court finds that far too many facts are in conflict for summary disposition

of the several liability questions in this case. Because summary judgment is ordinarily improper when the evidence is subject to conflicting interpretations, *see Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523, 526 (5th Cir. 1960), the court denies the motion for the reasons set forth below.

BACKGROUND[1]

Defendant, a merchant of backhoes, loaned Romie Black a model 580-D backhoe while he was awaiting delivery of another model. The loan of the backhoe was an integral part of a sale between plaintiffs' decedent and the defendant. Plaintiffs claim that neither the defendant nor its employees provided an owners manual for the borrowed machine. Plaintiffs further allege that defendant's employees failed to warn of dangers related to use of the backhoe on sloped terrain and failed to inspect it prior to the loan. According to plaintiffs, a broken seat latch -- broken prior to the accident -- allowed the operator's seat on the machine to rotate freely, ejecting Black onto a "roll-over-protection-system" bar that was supposed to protect the driver in the event of a roll-over. The decedent died immediately after the accident as a result of head injuries.

Defendant offers a far different version of these facts. Although defendant agrees that J.I. Case is a merchant in

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[1] The court refers to plaintiffs' statement of undisputed facts in support of its motion for partial summary judgment and to defendant's response to this statement of facts. Additionally, the court refers to the parties' respective briefs.

backhoes, that the loan of this particular machine was part of a sale to the decedent and that the decedent died of head injuries, the common ground between the parties ends here. Often relying on the same depositions and affidavits from which plaintiff sees no genuine issue on the question of liability, defendant forwards evidence to suggest: 1) that an instruction manual could have been provided because of defendant's normal custom of keeping such a manual in water-tight compartment on the backhoe; 2) that prior to the loan, the store manager showed the decedent how the controls operated and supervised a test run; 3) that in any event, dangers inherent in the operation of such a machine on rough terrain should have been open and obvious; 4) that the rotating seat mechanism, if broken, could have broken during the accident; and 5) that the accident possibly was the result of decedent's own negligence because he apparently failed to fasten a seatbelt on the vehicle and tried to use it to clear heavy debris on sloped terrain.

AUTHORITY

The court agrees with the defendant that the evidence presented is subject to conflicting interpretations best left for a jury's determination. Although plaintiffs cite several summary judgment cases, the central point here is not whether the defendant has come forward with evidence to support an essential element of the defense, but whether a reasonable juror might find for the defendant. Defendant has forwarded evidence in support of its defense by using some of the same depositions and affidavits upon which plaintiffs rely. From there, the question the court must ask is whether a reasonable juror could find for the defendant.

See Anderson v. Liberty Lobby, Inc., 477 U.S. 252, 249, 106 S. Ct. 2505, 2511, 91 L.Ed. 2d 202, 212 (1986). The court cannot venture into credibility determinations, weigh evidence or draw inferences from the facts. *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987). Additionally, all facts must be viewed in a light favorable to the nonmovant. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed. 2d 538, 553 (1986).

A request for summary judgment in a case involving an alleged breach of duty necessarily involves an uphill battle for the movant. Summary Judgment is rarely granted in such cases because the liability of a defendant is highly fact-dependent. *See, e.g., Matthews v. Ashland Chemical, Inc.*, 703 F.2d 921, 925 (5th Cir. 1983) (summary judgment ordinarily improper where issues require the determination of the reasonableness of a party's acts and the conduct of the parties under all the facts and circumstances); *Ross v. John's Bargain Stores*, 464 F.2d 111, 115-16 (5th Cir. 1972) (whether retailer was negligent in selling an item without a warning which it knew or should have known was inherently dangerous is question for the trier of fact); *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970) (summary judgment is generally inappropriate where the reasonable person standard must be applied to conflicting testimony). *See also* J. Moore, 6-pt. 2 *Moore's Federal Practice* Para. 56.17[42].

To support their motion for partial summary judgment, plaintiffs offer the depositions of defendant's employees and their "admissions" of liability. For example, to show

that the loan of the backhoe was unaccompanied by verbal or written warnings, the plaintiffs point to the deposition of store manager Logan Cloud in which Cloud refers to the usual practice of supplying manuals with backhoes.[2] Plaintiffs assert that no manual or instructions were given with this particular backhoe. To show that the backhoe left the store uninspected, they forward the testimony of employee David Ray and his explanation that a work order normally accompanies inspection of a machine and that no work order was found.[3] To show that a broken seat latch would allow the seat to rotate freely and to throw the decedent onto the bar of the "roll-over protection system," the plaintiffs offer the affidavit of their own expert, Richard E. Forbes, who stated that a broken seat latch would "render a backhoe unsafe for operation" and "that it would prevent the operator from exiting the equipment in a safe manner..."[4]

In keeping with the duty of a nonmovant to supply enough evidence to create a factual dispute, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986), defendant has tried to show how the evidence could be viewed favorably to the defendant. Concerning the first theory of liability forwarded by plaintiffs -- breach of warranty of merchantability --

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[2] Deposition of Logan Cloud, p. 20 to plaintiffs' "Exhibit A."

[3] Deposition of David Ray, pp. 38-40 to plaintiffs' "Exhibit F."

[4] Affidavit of Dr. Richard Forbes, p. 2 to plaintiffs' "Exhibit C."

defendant offers it supplemental answer to one of plaintiffs interrogatories regarding the expected opinion testimony of experts at trial. In this response, defendant set forth the proposed testimony of two engineers, Dr. Craig A. Depken and Charles Hanson, who suggest that "the possible mechanical failures which could occur took place when the backhoe struck the ground."[5] These experts also are prepared to comment on the possibility that the decedent did not have the seat locking mechanism in place or that his alleged failure to use the seatbelt contributed to the accident. This evidence suggests the existence of issues of fact crucial to a determination of whether the product was defective.

Regarding plaintiffs' claims of failure to warn and in particular, the alleged testimony from Cloud that no manual accompanied the loan of the backhoe, defendant correctly points out that Cloud, at best, expresses uncertainty as to the presence of a manual with the machine. He states simply that "[m]ost Case equipment has a compartment for operator's manuals" and that

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[5] Defendant's Supplemental Response to Interrogatory Number 10, pp. 4-5. Plaintiffs assert that use of this interrogatory to rebut plaintiffs' summary judgment motion is improper by pointing out that it is unsupported by affidavit. But Rule 56(c) makes clear that answers to interrogatories are but one of several materials that may be considered on a motion for summary judgment. *Fed. R. Civ. P.* 56(c).

"normally the operator's manual stay[s] with the backhoe."[6] Nor does the testimony of other witnesses show for a fact that the manual was missing when the backhoe left defendant's shop. Plaintiffs refer the court to Ray's deposition, but Ray similarly states that he "[didn't] know" whether a manual was provided.[7] Joe Robbins, another employee of the defendant, states that he personally did not give the decedent a manual, and that to his knowledge neither did any other employee.[8] None of these statements amounts to an outright declaration that Black did not receive an owner's manual. Even if such a statement were made, it would be the role of the jury, not the court, to determine whether defendant should be held liable in light of all of the other evidence presented.

Regarding the alleged lack of verbal warnings, Cloud suggested that the decedent was allowed to test the controls and run the machine before he left the shop.[9] Thus, even taking a statement of employee Robbins that he did not provide verbal instructions as true, evidence exists from which a jury could infer that warnings and instructions were given. Whether this instruction was sufficient or

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[6] Deposition of Logan Cloud, p. 19.

[7] Deposition of David Ray, p. 24.

[8] Affidavit of Joe Robbins, p.1 to plaintiffs' "Exhibit G."

[9] Testimony of Logan Cloud, p. 21 to plaintiffs' "Exhibit A."

instead contributed to a negligent failure to warn is a determination rightly left to the jury and not the court.

Finally, plaintiffs' claim that the backhoe was not inspected before it left defendant's shop is also surrounded by factual ambiguity. Although one employee stated that a work order normally accompanies inspection of a machine and although such an order could not be located, this alone is insufficient to suggests as a matter of law a total failure to inspect and maintain the backhoe. Defendant forwards the deposition of Cloud to show that many previous records were stored in crates and that defendants have tried to pull records relating to this particular backhoe. The court agrees with the defendant that the fact that no work order was located is not conclusive proof of failure to inspect; it is simply evidence that the work order cannot now be located, a factor to be considered by the jury along with the other facts in this case.

Although acknowledging at the outset of its brief that "[t]he purpose of [a] Motion for Summary Judgment is to test intrinsic merits of a case and to determine prior to trial whether any factual controversy is presented," *Southern Miss. Planning & Dev. Dist. v. Robertson,* 660 F. Supp. 1057 (S.D. Miss. 1986) and citing numerous cases to the same effect, plaintiffs seem to assume that every issue of fact has already been resolved in their favor. Even when facing strong evidence from a movant and weak evidence from the nonmovant, a trial court may act with caution and deny summary judgment where there is reason to believe the better course would be to proceed to trial. *Anderson,* 477 U.S. at 255. In this case, however, the

defendant has more than sufficiently met its burden by presenting evidence in its favor on each of plaintiffs' theories of recovery.

For all of the above reasons, plaintiffs' motion for partial summary judgment on the issue of liability is denied. A separate order in accordance with this memorandum opinion will be entered this day.

THIS 10th day of May, 1991.

/S/ GLEN H. DAVIDSON
GLEN H. DAVIDSON
United States District Judge

FILED
MAY 10, 1991
JAMIE WALKER, Clerk
By Deputy Clerk

Supreme Court, U.S.
FILED
OCT 27 1994
CLERK

NO. 94-603

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MARIE BLACK, INDIVIDUALLY AND AS REPRESENTATIVE OF RANDY BLACK, PAM BLACK GUMM, KITTY BLACK, ADULTS AND WILLIAM BLACK AND TAMMY BLACK, MINORS, THE SOLE AND ONLY HEIRS-AT-LAW OF ROMIE BLACK,

Petitioner,

versus

J. I. CASE,

Respondent.

Respondent J. I. Case's Brief In Opposition To Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether, in light of no meaningful conflict among the circuits on the issue, the holding by the United States Court of Appeals for the Fifth Circuit that the district court's denial of summary judgment was not reviewable on appeal where there had been a subsequent trial on the merits and a jury verdict adverse to the movant is in error.

*2. Is it proper to deny a motion for summary judgment when the party opposing the motion has not offered any factual evidence, by way of affidavit or otherwise, in opposition of the motion?

*3. Is the rule applied by the United States Court of Appeals for the Fifth Circuit, refusing to hear appeals of denials of motions for summary judgment, to be applied prospectively or retroactively?

*4. Is the grant of partial summary judgment in any way procedurally distinct from the denial of summary judgment so that the grant of partial summary judgment may be reviewed on appeal and denial of summary judgment may not?

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*Although questions 2-4 were raised, the petitioner failed to address them in the Petition for Writ of Certiorari. Thus, the respondent answers in summary fashion. The second question presented is a mischaracterization of the

evidence by the petitioner. Although not part of the record, several items of evidence were offered in opposition to the petitioner's summary judgment motion: (a) copy of a work order; (b) Supplemental Response to Interrogatories Propounded to the Defendant by the Plaintiffs; (c) David Ray deposition; (d) Randy Alan Black deposition; and (e) Logan Cloud deposition. Further, it is clearly the movant's responsibility to prove that he is entitled to judgment as a matter of law, Celotex Corp v. Catrett, 477 U.S. 317 (1986), and the district court noted correctly that the movant failed to do so. The court concluded that " . . . the defendant has more than sufficiently met its burden by presenting evidence in its favor on each of plaintiffs' theories of recovery." [Petition for Writ of Certiorari at 34-35]. The third question presented is essentially a question for the Fifth Circuit to determine. Unfortunately for the petitioner, she did not ask for a rehearing. In any event, this question is phrased in misleading terms in that this "rule" has been followed by the Fifth Circuit for years. See Zimzores v. Veterans Admin., 778 F.2d 264, 267 (5th Cir. 1985); Wells v. Hico ISD, 736 F.2d 243, 251 n.9 (5th Cir. 1984). Therefore, whether or not the rule should be applied prospectively or retroactively is moot. Finally, the fourth question presented has little merit since it is well established that a grant of summary judgment is reviewable. The principal reason is that such a grant takes the case away from the jury. The distinction here is that petitioner, whose motion was denied, saw her case travel through a full trial on the merits, eventually decided by an unbiased jury. Thus, the question of whether summary judgment should have been denied is now moot.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NO. 94-603

MARIE BLACK, INDIVIDUALLY AND AS REPRESENTATIVE OF RANDY BLACK, PAM BLACK GUMM, KITTY BLACK, ADULTS AND WILLIAM BLACK AND TAMMY BLACK, MINORS, THE SOLE AND ONLY HEIRS-AT-LAW OF ROMIE BLACK,

Petitioner,

versus

J. I. CASE,

Respondent.

Respondent J. I. Case[1] respectfully requests that this Court deny the Petition for Writ of Certiorari to review the United States Court of Appeals for the Fifth Circuit's affirmance of the underlying case.

OPINIONS AND ORDERS BELOW

The May 10, 1991, order and opinion of the United States District Court for the Northern District of

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[1] J.I. Case is a Delaware corporation wholly owned by Teneco, Inc., a Delaware corporation. J.I. Case has no subsidiary companies.

Mississippi, Eastern Division, denying petitioner's partial summary judgment motion are unreported and reproduced in the Petition for Writ of Certiorari at 26-35. An appeal was initially considered by the United States Court of Appeals for the Fifth Circuit on October 1, 1992, in a memorandum opinion reported at 973 F.2d 1226 (5th Cir. 1992) and reproduced in the Supplemental Appendix. This opinion was subsequently withdrawn and vacated on December 9, 1992. The May 27, 1994, memorandum opinion of the United States Court of Appeals for the Fifth Circuit is reported at 22 F.3d 568 (5th Cir. 1994) and is reproduced in the Petition for Writ of Certiorari at 11-23. Petitioners failed to petition for rehearing or seek reconsideration by the Fifth Circuit en banc.

STATEMENT OF THE CASE

The petitioner's wrongful death action against respondent J. I. Case was originally filed in the Circuit Court of Lee County, Mississippi on March 26, 1990.[2] Respondent removed the case to The United States District Court for the Northern District of Mississippi,

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[2]On September 13, 1986, Romie Black was killed while operating a model 580-D backhoe loaned to him by J. I. Case when the backhoe rolled over, causing fatal injuries to Mr. Black's head. [T. 49, 56, 207-08]. It should be noted that the petitioner assumed certain facts in the "Statement of the Case" part of the Petition for Writ of Certiorari that were disputed by the respondent, and which the trial jury resolved in favor of the respondent. For example, the petitioner states that the accident resulted from the failure of a seat locking mechanism. [Petition for Writ of Certiorari at 2-3]. The trial jury agreed with the respondent and repudiated this theory of the cause of the subject accident.

Eastern Division, alleging jurisdiction based upon complete diversity of citizenship.

On January 4, 1991, the petitioner filed a motion for partial summary judgment as to liability for breach of an implied warranty of merchantability, failure to warn of latent defects, failure to instruct Black on the safe operation of the backhoe, and failure to inspect. On January 18, 1991, the respondent filed its Response to Plaintiff's Motion for Partial Summary Judgment, along with its Memorandum of Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment. On May 10, 1991, the district court denied petitioner's motion. The court found that the evidence created factual disputes with regard to each ground for summary judgment. Subsequently, the case was fully tried on the merits for three days. The petitioner then moved for a directed verdict at the close of all the evidence. The court denied this motion and the jury returned a favorable verdict for the respondent. Finally, the petitioner appealed the district court's denial of her motion for partial summary judgment to the United States Court of Appeals for the Fifth Circuit.[3]

On October 1, 1992, the Fifth Circuit delivered its first opinion holding that the denial of summary judgment cannot be reviewed after a final judgment on the merits is entered adverse to the movant. [See Supplemental Appendix at 6a].

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[3]The petitioner also argued that the district court erred in several other respects. However, the Fifth Circuit found that these remaining issues were without merit, and they were not raised in the Petition for Writ of Certiorari.

The Fifth Circuit later withdrew and vacated this opinion, replacing it with a decision reported at 22 F.3d 568.[4] However, the same result was reached.[5] The Fifth Circuit reiterated that it will not review the pretrial denial of a motion for summary judgment after a full trial on the

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[4]Apparently, the withdrawal was due to a perceived conflict with Satcher v. Honda Motor Co., 984 F.2d 135 (5th Cir. 1993) in which the Fifth Circuit reviewed and reversed the district court's denial of summary judgment after the movant received an adverse judgment following a trial on the merits. However, that opinion was vacated and withdrawn and replaced by Satcher v. Honda Motor Co., 993 F.2d 56 (5th Cir. 1993) in which the Fifth Circuit does not address the issue of whether a denied summary judgment motion should be reviewed on appeal after a full trial on the merits. Thus, the court concluded that there is no conflict within its circuit regarding this issue. Notably, the petitioner cites Albatross Shipping Corp. v. Stewart, 326 F.2d 208 (5th Cir. 1964) as authority for the proposition that there is a conflict within the Fifth Circuit on this issue. However, Albatross dealt with the review of a granted motion which is concededly distinct from the issue at hand. In any event, the petitioner has failed to seek a rehearing en banc which is the appropriate route for an appellate court to resolve an alleged intracircuit conflict.

[5]In the Petition for Writ of Certiorari, the petitioner argued that even the circuits relied upon in the Fifth Circuit's opinion, including the Fifth Circuit itself, will review other interlocutory orders on appeal from final judgment. This argument is meaningless because we are not concerned with other interlocutory orders. Further, the petitioner fails to articulate a rationale for why a denial of summary judgment or any other interlocutory order should be reviewable.

merits is entered adverse to the movant.[6] However, the court cautioned that its ruling did not extend to all cases in which summary judgment was denied.[7]

REASONS FOR DENYING THE WRIT

A. *There is Currently no Meaningful Conflict Among the Circuits*

The United States Supreme Court has previously stated that "[t]he denial of a motion for a summary judgment because of unresolved issues of fact does not

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[6]The court reasoned that reviewing the denial of a summary judgment motion would circumvent the established rule that a party who received an adverse judgment cannot be granted a j.n.o.v. unless he moved for a directed verdict in the district court. In other words, such review would allow the appellate court to reverse even if no motions for directed verdict and j.n.o.v. had been made at trial. "If such motions have been made, their denial can be reviewed on appeal and there is no good reason to also review the pretrial denial of the same party's motion for summary judgment." [Petition for Writ of Certiorari at 18]. As additional support for its position, the court opined that such a review would restrict the district court's discretion, and it would lead to the unacceptable result of reversal due to insufficient evidence at summary judgment even if the trial evidence was sufficient.

[7]The court stated that it was not dealing with qualified immunity cases or cases where a contemporaneous grant of summary judgment is being reviewed. Nonetheless, it should be noted that the petitioner continuously cited many of these cases as authority for her position in the Petition for Writ of Certiorari.

settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing -- that the case should go to trial." Switzerland Cheese Assoc. v. Horne's Market, 385 U.S. 23, 25 (1966). However, the trial judge's right to deny summary judgment does not imply that he can do so for the sole reason of hearing the case. Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986). Rather, the trial judge must determine that the evidence in the record does not support a reasonable jury finding in favor of the movant. Anderson, 477 U.S. at 255.

The Fifth Circuit's view that a denial of summary judgment is not reviewable after final judgment is entered adverse to the movant is followed by those circuits ruling directly on this issue. See Watson v. Amedco Steel, 29 F.3d 274, 276 (7th Cir. 1994)[8]; Lama v. Borras, 16 F.3d 473, 476 (1st Cir. 1994); Bottineau Farmers Elevator v. Woodward-Clyde, 963 F.2d 1064, 1068 n.5 (8th Cir. 1992); Lum v. City & County of Honolulu, 963 F.2d 1167, 1169-70 & n.1 (9th Cir. 1992); Jarrett v. Epperly, 896 F.2d 1013, 1016 n.1 (6th Cir. 1990); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 & n.14 (Fed. Cir. 1986); Boyles Galvanizing & Plating v. Hartford Acc. & Ind., 372 F.2d 310, 312 (10th Cir. 1967).

The rationale for this position is simply that petitioner's attack on the denial of summary judgment has been overtaken by subsequent events, namely, a full three

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[8]Watson clearly contradicts petitioner's statements in the Petition for Writ of Certiorari, contending that the Seventh Circuit will review all antecedent interlocutory rulings on appeal from the district court's final judgment.

day trial and an adverse jury verdict. See Lama, 16 F.3d at 476 n.5. Thus, at the time of appeal, the determination of whether or not summary judgment should have been granted generally becomes moot. Watson, 29 F.3d at 277. "After trial, the merits should be judged in relation to the fully developed record emerging from that trial. We will not at that point step back in time to determine whether a different judgment may have been warranted on the record at summary judgment."[9] Id. at 278.

A synopsis of the many reasons for not reviewing denied summary judgment motions was articulated by the Ninth Circuit in Locricchio v. Legal Serv. Corp., 833 F.2d 1352 (9th Cir. 1987):

> To be sure, the party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decides in his favor. The injustice arguably is greater when the verdict goes against him. However, we believe it would be more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and

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[9]Notably, the Fifth Circuit has espoused this view since 1948 when it stated "[t]he saving of time and expense is the purpose to be obtained by summary judgment in a proper case. When in due course the final trial is had on merits it becomes the best test of the rights of the movant. If he wins on the trial he has his judgment. If he loses on a fair trial it shows that he ought not to have any judgment." Woods v. Robb, 171 F.2d 539, 541 (5th Cir. 1948).

> affidavits at the time of summary judgment motion demonstrated the need for a trial. After considerable research, we have found no case in which a jury verdict was overturned because summary judgment had been improperly denied. We hold, therefore, that the denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits.

Locricchio, 833 F.2d at 1359.

B. *Even the Holley Ruling Would Not Warrant a Review of Petitioner's Denied Summary Judgment Motion*

The Eleventh Circuit is the only one that is not directly in line with the rest of the circuits who have confronted this issue.[10] See Holley v. Northrop

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[10]It should be noted that there is a twenty-three year old case out of the Second Circuit in which a denial of summary judgment was reviewed on appeal. See Savarin Corp. v. National Bank of Pakistan, 447 F.2d 727 (2nd Cir. 1971). After discussing the merits of the case, the court simply stated that "[t]he motion for summary judgment was properly denied." Id. at 732. This was the only reference to its review of the denied summary judgment motion, and no explanation was given. As a result, this case has been criticized by the other circuits who have considered this issue. Further, it appears that this court would probably fall in line with the other circuits who have considered this issue if confronted with it today. More recent cases have stressed the point that the only reason the Second Circuit reviewed the denial of summary judgment motions was

Worldwide Aircraft Serv., 835 F.2d 1375 (11th Cir. 1988). In Holley, the Eleventh Circuit stated that "[s]ummary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal; instead it was intended as a device to diminish the effort, time, and costs associated with unnecessary trials. In keeping with those purposes, we hold that the party whose motion for summary judgment was denied may not appeal the motion if the party admits that: (a) by trial the evidence produced by the opposing party was sufficient to be presented to the jury; or (b) by trial the evidence had been supplemented or changed in some manner favorable to the party who opposed summary judgment." Id. at 1377-78.[11]

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due to the fact that they were accompanied by granted motions which are deemed by all circuits to be reviewable. The court stated that it does this for reasons of judicial economy, realizing that the issues presented by both motions are inextricably bound. Barhold v. Rodriguez, 863 F.2d 233, 237 (2nd Cir. 1988). Thus, through implication, it appears that if the Second Circuit was confronted today with the sole issue of whether a pretrial denial of summary judgment (unaccompanied by a granted motion) was reviewable after final judgment, the court may find that it is not.

[11] The Fifth Circuit tried to interpret the Eleventh Circuit's holding in Holley. [Petition for Writ of Certiorari at 16-17 n. 6]. The Fifth Circuit suggested that Holley supports a dual system for evaluating denied motions for summary judgment. "Under this dichotomy, if the motion were denied on 'factual' grounds (e.g., no evidence as to an element required under governing law), then the order should not be reviewable. However, if the motion were denied on 'legal' grounds (e.g., the elements that must be proven under governing law), then that determination should be reviewable."

The Eleventh Circuit is not really in conflict with the other circuits' position. For example, Holley has been cited in numerous cases as authority for the proposition that denied summary judgment motions should not be reviewed on appeal of final judgments. See, e.g., Watson, 29 F.3d at 276; Lama, 16 F.3d at 476; Jarrett, 896 F.2d at 1016 n.1. In addition, the Eleventh Circuit itself in Holley stated that "[o]ther jurisdictions have gone so far as to refuse appeals on all motions for summary judgment." Holley, 835 F.2d at 1378 n.7. Thus, the Eleventh Circuit has admitted that it is not in direct conflict with the Fifth Circuit and those in harmony with its view.

In any event, the Fifth Circuit would have reached the same result in this case even if it had followed Holley's view. Since the petitioner's motion for summary judgment was denied on "factual" grounds, the order is not reviewable.

CONCLUSION

The Petition for Writ of Certiorari is without merit. There is no meaningful conflict among the circuits on this issue. Further, even if a conflict does exist between Holley's holding and the rest of the circuits' position, the Eleventh Circuit must first more fully develop its rationale before the United States Supreme Court can justify spending its scant judicial resources on resolving this issue.

Therefore, the Petition for Writ of Certiorari should be denied.

DATED: OCTOBER 27, 1994

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7010

MARIE BLACK, INDIVIDUALLY AND AS REPRESENTATIVE OF RANDY BLACK, PAM BLACK GUMM, KITTY BLACK, ADULTS AND WILLIAM BLACK AND TAMMY BLACK, MINORS, THE SOLE AND ONLY HEIRS-AT-LAW OF ROMIE BLACK,

Plaintiffs-Appellants

versus

J. I. CASE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi.

Before JONES, DUHÉ, and WIENER, Circuit Judges.

PER CURIAM:

In this Mississippi diversity case arising from the accidental death of Romie Black (Decedent), his successors, Plaintiffs-Appellants herein (collectively, the Blacks), appeal the adverse jury verdict absolving Defendant-Appellee J.I. Case Company, Inc. (Case) of liability. Finding that the district court committed no reversible error, we affirm.

I

FACTS

Decedent, an experienced backhoe operator, ordered a new backhoe from one of Case's retail stores. As an accommodation, Case's store operator allowed Decedent to borrow an older model Case backhoe pending delivery of the new one. A few days later while Decedent was using the borrowed machine to clear small trees and debris on sloping land, the backhoe rolled over. Decedent, who was not wearing a safety belt, struck his head on one of the support posts of the backhoe's "Rollover Protection System" (ROPS). He died shortly thereafter from injuries sustained in the accident.

The Blacks sued Case in Mississippi state court for Decedent's wrongful death, and Case timely removed the action to federal court.[1] The jury exonerated Case from liability in the death of Decedent, and a final judgment was entered to that effect. The Blacks have appealed to

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[1]See 28 U.S.C. §§ 1332, 1441 (1988).

us from that judgment.

II

STANDARD OF REVIEW

In reviewing a jury's findings of fact, we apply the standard set out in Boeing Co. v. Shipman[2] "[A] jury verdict will not be overturned unless the 'facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable [jurors] could not arrive at a contrary verdict.'"[3] In reviewing the evidentiary rulings of the judge who presides at a jury trial we apply the abuse of discretion standard, with considerable deference.[4]

III

ANALYSIS

On appeal the Blacks quarrel extensively with the factual findings of the jury, but also proffer six claims of legal error by the district court. The Blacks assert that the district court erred by:

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[2]411 F.2d 365 (5th Cir. 1969).

[3]LeBoeuf v. K-Mart Corp., 888 F.2d 330, 332 (5th Cir. 1989) (quoting Boeing Co., 411 F.2d at 374).

[4]See Young v. City of New Orleans, 751 F.2d 794, 797 (5th Cir. 1985).

A. Refusing to grant partial summary judgment on liability in favor of the Blacks after they showed that, as a matter of law, Case had (1) breached the implied warranty of merchantability, (2) failed to warn Decedent of the dangers inherent in the backhoe, and (3) failed to inspect the backhoe;

B. Refusing to grant a directed verdict;

C. Allowing Case to amend the pre-trial order to allege that the accident was caused by the sole negligence of Decedent;

D. Refusing to allow testimony regarding the position of the backhoe's boom at the time of the accident;

E. Instructing the jury regarding Decedent's misuse of the backhoe; and

F. Refusing to allow the jury to consider awarding punitive damages.

We now address, seriatim, the Blacks' foregoing assignments of error.

A. *Denial of Partial Summary Judgment*

The Blacks insist that there were no genuine issues of material fact regarding liability so that the district court's denial of their motion for partial summary judgment was error. But, as denial of a motion for summary judgment is interlocutory, no appeal lay at the

time the motion was denied. Consequently, the Blacks now seek review of the denial of their motion, which was unappealable when the order was issued.

The Blacks cite no authority for their proposition that an interlocutory order denying summary judgment, unappealable at the time it was issued and filed, nevertheless becomes appealable following rendition of a final judgment on the merits adverse to the movant. Neither does our independent research reveal controlling authority in this circuit on that point. Therefore, we adopt the rule of the Sixth, Ninth, and Federal Circuits that a denial of a motion for summary judgment, interlocutory and therefore unappealable at the time rendered, is not subject to review on appeal of the final judgment entered following completion of the trial.[5] Like

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[5]Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990); Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1358-59 (9th Cir. 1987); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986), cert. dismissed, 479 U.S. 1072, 107 S.Ct. 1262, 94 L.Ed.2d 124 (1987); see also Holley v. Northrop Worldwide Aircraft Servs., 835 F.2d 1375, 1377-78 (11th Cir. 1988) (restricting appeals of denied summary judgment motions if sufficient evidence was adduced for the case to go to the jury or if the evidence had been supplemented or changed in some manner favorable to the party who had opposed the motion for summary judgment); cf. Walther v. Lone Star Gas Co., 952 F.2d 119, 122-23 (5th Cir. 1992) (holding that, in the context of the Age Discrimination in Employment Act, after a trial on the merits, "a reviewing

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those circuits, we hold that "[w]here summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed."[6]

B. *Denial of Directed Verdict*

The Blacks also ask us to reverse the district court's denial of their motion for a directed verdict, but this is just a request for us to review the sufficiency of the evidence. The district court should grant a motion for directed verdict if, and only if, "there is a lack of substantial evidence to support a jury verdict."[7] Or, in the words of the newly revised Federal Rules of Civil Procedure, a motion for judgment as a matter of law should be granted when "there is no legally sufficient

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appellate court need not address the sufficiency of plaintiffs prima facie case, and may proceed directly to the ultimate question of whether plaintiff has produced sufficient evidence for a jury [finding]").

[6]Epperly, 896 F.2d at 1016. Like the Sixth Circuit, we find cases which state that "interlocutory orders merge into the final judgment and may be presented on appeal of that final judgment, but we find no case which deals specifically with the appealability of a denial of summary judgment after a full trial on the merits." Id. at 1016 n.1. Therefore, we follow these circuits and reject this appeal.

[7]Dickinson v. Auto Center Mfg. Co., 733 F.2d 1092, 1102 (5th Cir. 1983).

evidentiary basis for a reasonable jury to have found for [the nonmoving] party."[8] On appeal, we will review the sufficiency of the evidence, but only if the appellant has raised the sufficiency issue in the district court by moving for a directed verdict.[9] When we say that we are reviewing a motion for a directed verdict, then, we are actually just reviewing the sufficiency of the evidence.[10] In other words, reviewing a denial of a motion for a directed verdict made at the end of trial and reviewing the sufficiency of the evidence are one and the same thing.

In the instant case, the evidence is sufficient to support the jury verdict. In grounding their merits challenge to the sufficiency of the evidence in the contention that three key facts - the seat-locking mechanism on the borrowed backhoe was broken either before or during the rollover; any operator of that backhoe would have struck his or her head on one of the posts of the ROPS in the event of a rollover; and the seat-locking mechanism was repaired after the accident in which Decedent was fatally injured - were "undisputed," the Blacks argue that such "undisputed facts" entitled

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[8]Fed. R. Civ. P. 50(a).

[9]See e.g., Coughlin v. Capitol Cement Co., 571 F.2d 290, 297 (5th Cir. 1978). In the absence of a motion for a directed verdict, we only inquire whether there was any evidence to support the jury's verdict, regardless of the sufficiency. Id. at 297.

[10]See Dickinson, 733 F.2d at 1102.

them to a directed verdict at the close of the evidence. They insist that, as a matter of law, those facts conclusively demonstrate a breach of the implied warranty of merchantability. We disagree, finding that such assertions by the Blacks miss the mark in several respects.

First, even if we assume for the sake of argument that those facts are "undisputed," they still do not entitle the Blacks to a directed verdict under Mississippi law. Section 75-2-314 of the Mississippi Code defines merchantable goods as those "fit for the ordinary purposes for which such goods are used."[11]In arguing that the subject facts demonstrate, as a matter of law, that the borrowed backhoe was unfit and thus unmerchantable, the Blacks completely misapprehend the relationship between these facts and the Mississippi law of merchantability. The "facts" that the seat was broken and that the operator would strike his or her head simply do not demonstrate a per se breach of the implied warranty of merchantability. At best they are evidence to be considered and weighed, along with all other admissible evidence, as proof of such a breach.

More important to our analysis here, however, is the realization that theses facts were not undisputed but were very much in dispute at the time of the Black's motion for directed verdict, just as they had been at the time of the Black's motion for partial summary judgment. The Blacks simply mischaracterize the facts as "undisputed." Thus, even if we were to review separately

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[11]Miss. Code Ann. § 75-2-314(2)c) (1972).

the trial court's denial of the Blacks' motion for a directed verdict, we would find no error in that denial which allowed the question of liability to go to the jury on such disputed facts.

C. *Amendment to the Pretrial Order*

The Blacks insist that the district court erred in allowing Case to amend the pretrial order on the first day of the trial. The pre-trial order listed, as one of the contested issues of fact, "whether a proximate, contributing cause of the accident was the negligence of the decedent in the operation of the backhoe in any of the particulars claimed by the defendant." The court allowed Case to amend on the first day of trial to allege that Decedent's own negligence was the sole and proximate cause of his death. The Blacks assert that this change in the pretrial order made the action "a different lawsuit at trial then was anticipated by [the Blacks]."

The decision "whether to permit amendment of the pretrial order in the course of the trial is generally a matter within the discretion of the trial judge, and the appellate court will intervene only if the trial judge acted arbitrarily."[12] Generally, pretrial orders should be modified "only to prevent manifest injustice."[13] We have stated, however, that "in the interest of justice and sound

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[12]Wallin v. Fuller, 476 F.2d 1204, 1209 (5th Cir. 1973).

[13]Canal Ins. Co. v. First Gen. Ins. Co., 889 F.2d 604, 609 (5th Cir. 1989).

judicial administration, an amendment of a pretrial order should be permitted where no substantial injury will be occasioned to the opposing party, the refusal to allow the amendment might result in injustice to the movant, and the inconvenience to the court is slight."[14]

Applying this reasoning to the instant case, we are satisfied that the district court did not err in allowing the pretrial order to be amended - i.e., the district court did not abuse its discretion. We do not agree with the Blacks' assertion that the amendment dramatically changed the character of the lawsuit. The Blacks obviously anticipated the need to counter Case's assertions of Decedent's comparative negligence, and they must have been aware that Case's theory of the lawsuit, which was later accepted by the jury, was that the accident was entirely the Decedent's fault. We do not find that allowing the amendment to the pretrial order caused"substantial injury" to the Blacks' presentation of their case to the jury, and we therefore reject the assertion of reversible error by the district court in allowing the amendment.

D. *Refusal to Admit Testimony on Boom Shift*

The Blacks next assert as error the trial court's refusal to admit testimony to the effect that the backhoe's boom shifted, thereby creating instability and causing it to roll over. In their brief to this court, the Blacks failed to

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[14]Sherman v. United States, 462 F.2d 577 (5th Cir. 1972) (citing Central Distrib., Inc. v. M.E.T., Inc., 403 F.2d 943, 946 (5thCir. 1968)).

address our standard of review of a trial court's ruling on admissibility of such evidence. This court will not "disturb a district court's ruling, disallowing the witness's testimony, absent a showing of clear abuse of the broad discretion vested in the district court on this issue."[15] The Blacks make no effort to inform us how the district court's refusal to admit the questioned testimony constituted an abuse of discretion. Instead, they merely complain in the abstract about the potential effect that the subject testimony could have had on the outcome of the case if that testimony had been heard by the jury. Without substantial support, such a complaint is pure conjecture and therefore insufficient to overcome the broad discretion allowed the district court in such evidentiary rulings. The court's refusal to admit testimony about a shift in the backhoe's boom was not an abuse of discretion.

E. *Jury Instructions Regarding Misuse of the Backhoe*

The Blacks complain stridently about the district court's instruction to the jury regarding Decedent's alleged misuse of the backhoe. As we understand their counsel's brief, this complaint is not the usual objection to the wording of an instruction. Rather, the Blacks quarrel with the court's giving the jury any instruction whatsoever concerning even the slightest possibility that Decedent

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[15] Young v. City of New Orleans, 751 F.2d at 797 (citing Bennett v. City of Slidell, 697 F.2d 657, 662 (5th Cir. 1983)); see Howard v. City of Greenwood, 783 F.2d 1311, 1313 n.2 (5th Cir. 1986).

might have operated the backhoe negligently. Candidly, we are at a loss to understand counsel's objection and can only conclude that he is confused about how the trial process works. Certainly the trial court instructed the jury regarding Case's allegations and evidence that the Decedent misused the backhoe; that was, after all, the gravamen of the defense's theory of how and why the accident occurred. Case's pre-trial order lists Decedent's misuse of the backhoe as one of the assertions Case intended to prove.

More to the point, however, is our inability to find anywhere in the record of this case that the Blacks preserved this claim of error. Neither does the Blacks' reply brief point out the location in the record of any such objection, even though the very existence of such an objection was expressly questioned in Case's brief to this court. The Blacks must know that we will not consider on appeal any allegation of error regarding a jury instruction unless the aggrieved party has properly preserved its right to complain by making a timely objection to such instruction in the trial court.[16]

F. *Punitive Damages*

Finally, the Blacks assert that the district court erred in refusing to instruct the jury as to recovery of punitive damages. In light of our rejection of all other assignments of error by the Blacks, and our affirmation of the jury's verdict and the final judgment rendered in

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[16]Fed. R. Civ. P. 51.

accordance therewith, the issue of punitive damages is moot.

IV

CONCLUSION

As the Blacks failed to prevail before the jury on the merits of their case, we are not constrained to review the trial court's interlocutory denial of the Blacks' motion for partial summary judgment. In adopting this position, we join the three circuits above identified. In like manner, we do not review the district court's denial of the Blacks' motion for directed verdict separately and apart from our review, on the merits, of the sufficiency of the evidence to support the jury's verdict. And, for the reasons set forth above, we find no merit in any of the remaining points raised by the Blacks and complained of by them as reversible errors of law on the part of the trial court. Finally, finding no reversible error in the jury's determinations of fact, and concluding that the facts thus found by the jury are supported by the evidence, we affirm the jury's verdict and the district court's final judgment based thereon.

AFFIRMED.